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Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 282

SWIFT & COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Illinois.

BRIEF FOR CHICAGO LIVE STOCK EXCHANGE AND THE CHICAGO TRADERS LIVE STOCK EXCHANGE, APPELLEES.

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OPINIONS BELOW.

The District Court entered findings of fact and conclusions of law (R. 197-209), but wrote no opinion. The report of the Interstate Commerce Commission (R. 57-89) is reported as *Swift & Co.* v. *Atchison, T.&S.F.Ry.Co.* at 274 ICC 557.

Jurisdiction.

The jurisdiction of this Court rests on 28 USC 1253 and 2101(b). Probable jurisdiction was noted on October 15, 1951. (R. 228).

QUESTIONS PRESENTED.

1. Did the Interstate Commerce Commission act rationally and within its authority in dismissing a complaint brought by appellant which assailed rates on livestock in carloads from interstate origins destined to a private sidetrack of the appellant on the Chicago Junction Railway near the Union Stock Yards in Chicago?

2. Does the report of the Commission dismissing said complaint contain adequate findings to show the reasons and basis for said dismissal?

3. When said findings are affirmative in form, are they supported by substantial evidence, and, when said findings are negative in form, do they fairly reflect the state of the record as to evidence on the point?

STATEMENT.

Purpose of statement.

These appellees intervened in the proceeding before the Commission in opposition to Swift, the complainant there and the appellant here, (R. 250), and they intervened as defendants in the Court below. (R. 131). They submit their Statement to state, with somewhat greater clarity and accuracy than is found in appellant's Statement, what the evidence shows (1) as to the operation of the carriers and the *quantity* of services involved in the terminal handling of livestock to Chicago, both present and upon the assumed issuance of an order in favor of Swift; and (2) how the deterioration in the *quality* of the railroad service provided

for producers' livestock sent to the public market for sale, which deterioration would inevitably result from the grant of the Swift demand, would disadvantage and injure the public market and the several hundred thousand producers who rely on its proper functioning. The evidence under (1) is essential to an understanding of the difference between the services covered by the rates to the Swift private sidetrack, which are assailed as unduly preferential, and the services covered by the rates to the unloading chutes at the Union Stock Yards, which are alleged to be unduly prejudicial and discriminatory. The evidence under (2) provides the basis for the Commission's conclusion that Swift was not entitled to rates on the level sought by it as a matter of justness, reasonableness, and desirability in the public interest. To avoid duplication, the statement of evidence showing the prospective deterioration in railroad service, which is the premise for the evidence under (2), is left to the briefs of other appellees.

Appellant's complaint before the Commission.

Appellant alleged before the Commission that the rates and charges on shipments of "direct[1]" livestock from interstate origins to its private sidetrack at its slaughter house at Union Stock Yards (hereinafter referred to as *the Yards*), Chicago, Illinois, are unreasonable in violation of section 1 of the Interstate Commerce Act, as well as unduly preferential and prejudicial in violation of section 3(1). (R. 50-55) By amendment, appellant prayed for an order requiring the defendant railroads to establish through routes and to apply thereover joint rates not in excess of those applicable to livestock destined to the unloading chutes of The Union Stock Yard & Transit Company (here-

[1] Shipments consigned directly to packers for slaughter and not shipped to the public market for sale thereon.

inafter referred to as *the Yards Company*) at Chicago,[2] (R. 55-56).

The rates assailed are made on combination, that is, the line-haul rate from origin to Chicago, plus the switching charge of the Junction ($28.80 per car at time of hearing) from its interchange with the line-haul railroad to the Swift delivery. The only rates on livestock published to private sidetrack deliveries served by the Junction are on this basis. However, the flat Chicago rate applies without the addition of any switching charge on livestock which is consigned to and delivered at the unloading chutes of Yards Company. While such chutes are on the rails of the Junction, that line does not participate in the service required in making such deliveries. Rather, such line-haul carriers have trackage rights over Junction rails to and from such chutes, and operate their own trains directly thereto from their outer yards.

What appellant demands by its complaint before the Commission is a through rate to cover the service of the line-haul carriers, *plus the switching service of the Junction* required in making delivery to appellant's private siding, on a basis the same as the through rate assessed for the service of the line-haul carriers alone in making delivery to the unloading chutes of the Yards Company. Such a rate basis is hereinafter referred to *as the flat Chicago rate or basis.*

Since appellant does not dispute the right of the Junction to compensation for its services, the Swift demand could be satisfied in only two ways: (1) by an order requiring the line-haul railroads and the Junction to establish through routes and to join in establishing thereover single factor

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[2] This prayer sought the exercise by the Commission of the power conferred by section 15(3) of the Act, reproduced in Appendix A hereto.

rates on the flat Chicago basis;[3] or, (2) by an order directed *wholly at the line-haul carriers* which would require such carriers to absorb the separately published switching charge of the Junction out of their flat Chicago rates.

The services presently provided on livestock destined to deliveries at the Yards and the services which would be required upon the grant of the Swift demand.

The present method of handling livestock destined to delivery at the Yards is as follows (R. 62-63): The line-haul carriers at their outer makeup and breakup yards assemble trains containing cars to be delivered in the Yards area. Sixty-three percent of such trains contain livestock exclusively. These trains of the line-haul carriers proceed directly from the outer yards to the unloading chutes of the Yards Company where the cars are spotted for unloading. While the cars are being unloaded, the engine cuts off, passes around the train and couples on to the other end, and then hauls the empty cars to the line-haul carrier's home yard. The remaining 37 percent of the trains contain both dead freight and livestock, and are referred to as consolidated trains. In the consolidated trains the dead freight is assembled immediately behind the engine. When the consolidated train reaches the eastern end of the eastbound running track going to the unloading chutes of the Yard Company, the train is stopped on the main line, the dead freight is cut out and then set in on one of the receiving tracks in the Junction's Ashland Avenue south yard. The engine then returns, couples on to the livestock and completes the remainder of its run in the same fashion as an exclusive livestock train. There is no switching of the livestock over switching leads, in and out of yard tracks, or to

[3] This is the relief sought under section 15(3) of the Act by appellant's amendment to its complaint. (R. 55-56)

or from private sidings, in the case of either the exclusive livestock train or the consolidated train. Nor, as to the livestock in either train, is there any service other than the direct move by the line-haul carrier's engine from its outer yard to the unloading chutes of the Yard Company.

If the Swift demand were granted, the producers' livestock destined to the unloading chutes at the Yards would continue to be handled in the manner just described, subject, however, to the additional interference, delay, congestion on running tracks, lengthened line-haul schedules, etc., shown by the evidence as summarized in the briefs of other appellees.

As to the direct livestock consigned to Swift (and other packers), completely new services of two separate carriers would be required: (1) The line-haul carrier would bring the stock from its outer yard to the east end of the Junction's Ashland Avenue south yard and would carefully place the livestock cars on an appropriate interchange track in that yard. (2) After that, the Junction would be required to provide the special switching service from the interchange track and through its various yards, running tracks, switching leads, etc., to the private siding of Swift, and to handle the empty cars in a reverse move after the livestock is unloaded.

The foregoing facts are stated so that the Court may be clearly advised as to: (1) the *direct* handling by line-haul carriers of producers' livestock from outer yard to unloading chutes at the Yards, whether in exclusive or consolidated trains; and (2) the essentially different *quantity* of service that would be required if a complete switching service by the Junction were added to a line-haul-carrier service, the line-haul-carrier portion of such through service being the practical equivalent of the complete service required in making direct deliveries to the unloading chutes of the Yards Company.

Injury to producers, and to the functioning of the public market and market agencies on which they rely, if the Swift demand were granted.

The Chicago Live Stock Exchange is an association of livestock market agencies which has 225 members. These members are the consignees for the livestock which producers send to the public market for sale. They act as agents and factors for the producers. (R. 710-711). There is an exceedingly close community of interest between livestock market agencies and the producers whom they represent. Such producers are vitally interested in the preservation of a flourishing central market. (R. 716)

The Chicago Traders Live Stock Exchange is an organization of dealers and order buyers who buy and sell livestock in the public market. (R. 787). The order buyers represent 920 slaughterers to the east and south for whom the Chicago public market is an important source of supply. (R. 789).

The ability of the Chicago market to perform its proper function in the economy of livestock production and marketing—this in the interest of and to the benefit of the producer—is dependent upon the railroad service rendered to Chicago and the railroad terminal handling of the public market stock at Chicago. It is essential that the railroad service be good railroad service. (R. 716-7, 719, 722-3, 783, 791, 808-9, 928). The producers, farmers, feeders, and livestock marketing agencies in whose interests this brief is presented, are concerned with the public market as a place at which livestock of all grades and species is bought and sold, publicly and freely. They have no concern with the so-called "direct" livestock which the appellant and other packers ship in, and which does not choose to use the market facilities of the public yards. So long as the railroad service to and from the public market is not handicapped,

impeded, and interfered with, these appellees are not affected, whether such "directs" be received by appellant (1) at its Omaha Packing Company pens, or (2) through the unloading chutes and overhead driveways of the Yards Company or (3) on its private siding at appellant's slaughter house. However, they do become vitally concerned with the place and method of delivery for "direct" livestock when such place and method interfere with and impede the orderly, efficient, and prompt transportation service to and from the public market on which so many are dependent.

The evidence before the Commission as to the interference with, delay to, and disruption of the railroad terminal operations in handling public market stock at the yards which would result from the grant of the Swift demand, and the lengthened and unsatisfactory line-haul operations and schedules from country points to Chicago which would be compelled in such a case, is summarized in the briefs of other appellees and need not be repeated here. Below is summarized the evidence which shows the direct and immediate injury of serious proportions which would be suffered by the public market and the vast number of producers, farmers and feeders who are dependent on its efficient operations, if the consequences testified to by the defendant railroads came to pass.

Several hundred thousand, possibly one-half a million, producers ship livestock to Chicago for sale on the public market during the course of the year. (R. 743) That livestock is consigned to commission firms which are members of The Chicago Live Stock Exchange. (R. 710, 744) After that livestock is unloaded into unloading chute pens of the Yards Company, it is delivered to employees of a commission firm who drive it to sales pens where it is prepared for sale. The livestock is fed, watered, rested and, when necessary, sorted. It is sorted so as to suit the needs of purchasers who desire a particular weight, flesh or class of animals. (R. 710, 744)

After the stock is sorted so as to put up the best appearance and bring the highest sales price, it is shown to all buyers on the market. Everyone is given an equal opportunity to buy in a free and open market. (R. 775-776)

The ability of the public market at Chicago to perform its function in the economy of livestock production and marketing, is dependent upon the railroad service received. The livestock must arrive early in the morning in order to be available for sale and in a fit condition at the opening of the market. Most railroad schedules are set up so as to provide for delivery well ahead of the opening hour. When livestock is delayed, it suffers in appearance, loses weight, and deteriorates generally. When the arrivals are late, the livestock must often be carried over, resulting in some depreciation as well as added cost for feeding and handling. (R. 719-722, 786, 809) The time in transit to market bears directly upon the net return which the producer receives. The longer the time in transit, the less satisfactory is the condition of the livestock when offered for sale. Additionally, the livestock shrinks, that is, it suffers a loss in weight. (R. 771-772)

A substantial volume of salable livestock is essential to the proper functioning of a public market. The greater the volume, the more effective will be the handling of the temporary and seasonable surplus from all parts of the country, and the less violent will be the swing in prices. Anything which tends to decrease the volume of livestock shipped to the Chicago market or to slow up the action of that market would be detrimental to the public interest. (R. 808-809)

If it becomes necessary for trunk lines to lengthen their schedules so as to allow for time to handle the "directs" to private sidings at the plant of Swift or other packers, the area from which livestock is now brought in without

stopping for feed, water or rest will be shortened. The shortening of that area will reduce the volume of livestock which producers are willing to send to Chicago for sale. (R. 722-723)

If schedules are lengthened, it will also impose on shippers additional hazards in connection with market fluctuations and that, in turn, will discourage shipments to Chicago. (R. 724)

If schedules are lengthened, the expense to the shipper in connection with stops for feed, water and rest, where none are now required, will be increased. That will be another deterrent to the use of the Chicago market. (R. 725) Within the last few years this particular situation occurred as to schedules from Colorado and the result has been a decline in the volume of livestock shipped to Chicago from that state. (R. 782-783, 785)

Any delay in the handling of livestock within the Chicago area will seriously interfere with the proper functioning of the market, not only as to the condition and appearance of the livestock, but also as to prices received. (R. 724, 778-781)

Prompt, speedy and efficient railroad service is also essential to the functioning of the public market as a source of supply to packers located to the east and south thereof. Shipments of such livestock run as high as 500 cars per day and average about 300 cars. Such cars must be ordered by 1:30 P.M. if shipment is to be made the same day. That is not possible unless the livestock arrives early so that it may be purchased by the order buyer and the necessary arrangements made for reshipment. Whenever there is a delay or an interference with the inbound movement, the outbound movement is disorganized. (R. 792-793, 795-796)

SUMMARY OF ARGUMENT.

I.

The scope of judicial review of Interstate Commerce Commission orders under the Administrative Procedure Act and the cases both prior and subsequent to the passage of that act is limited to an inquiry as to whether there is a rational basis for the Commission's conclusion, whether there has been a full and impartial hearing and whether the Commission acted within its statutory authority. The appellants apparently lose sight of these restrictions upon the judicial function and seek to have this Court substitute its judgment for that of the Commission on the question of what rate would be just, reasonable, non-preferential, non-prejudicial and non-discriminatory upon all the evidence. They base their objections to the Commission order dismissing their rate complaint upon the assertion that the Commission gave inordinate weight to certain circumstances and insufficient weight to certain other circumstances. This Court should not and cannot entertain such a plea since to do so would be to impose upon a field which has been left by Congress to the absolute discretion of the Commission. These appellees will show that the Commission's report discloses a rational basis for its order of dismissal and that the reasons given therefore find support in substantial evidence of record.

II.

The Commission's construction and application of the provisions of the Interstate Commerce Act dealing with the justness and reasonableness of rates is sound and in accord with the law.

In the absence of a finding of unjust discrimination and undue prejudice the Commission has no power, by order directed against the line-haul carrier alone, to require such carrier to extend a rate published by it to Chicago, as a point on its line, to a delivery not on its line, that is, to require such carrier to absorb switching charges. The Commission found no such discrimination or prejudice. That subject is discussed under III below.

Under section 15(3) of the Act, the Commission does have the power to require the establishment of through routes and joint rates, that is, to require the line-haul railroads and the Junction to establish single factor rates on the flat Chicago basis from an interstate origin to Swift's private track, but such power can only be exercised when the through route and joint rate is necessary or desirable in the public interest. The Commission not only made the finding that the establishment of joint rates was not necessary or desirable in the public interest, but further held that appellant's proposal would be detrimental to or against the public interest. This finding was premised on the effect on livestock transportation services which would result from calling upon the line-haul carriers and the Junction to handle a large volume of "direct" livestock to packers through the Junction's Ashland Avenue south yard. The Commission found that the burden of handling such stock would seriously interfere with, delay and disrupt terminal operating conditions and the movement of livestock generally.

Swift offered no evidence on the question of public interest and neither in its complaint in the lower court nor its brief in this court does it assert that the findings of the Commission as to the matters of public interest fail to conform with the evidence. Under these circumstances the order of dismissal as to matters of justness, and reasonableness under section 1 of the act would appear to be incontestable.

Appellant argues that the Commission's order dismissing its complaint is invalid because the Commission made no finding that the cost of the service of the line-haul carrier plus the cost of the Junction to the Swift private sidetrack exceeded the cost of service of the line-haul carrier alone to the unloading chutes of the Yards company. Since the burden was on Swift as a complainant, it was not incumbent upon the defendant or the Commission to make any showing as to relative costs. Furthermore, this Court has repeatedly held that evidence and findings with respect to costs are not indispensable support for an order fixing rates and rate relations.

The validity of the Commission's order must be tested from the standpoint of whether its report contains adequate reasons supported by substantial evidence for refusing to require line-haul carriers to maintain in connection with the Chicago Junction, a rate basis to the Swift private siding no higher than that which the line-haul carriers maintain to the unloading chutes of the Yards company. It has already been demonstrated that the Commission correctly refused to require the line-haul carriers and the Junction to establish the through routes and joint rates desired by Swift under section 15(3) because of the adequately supported findings that such would not be necessary or desirable in the public interest. The important thing to note is that the validity of this latter finding being established, the only questions remaining relate to whether the higher combination of through rates on livestock destined to Swift's private siding than on the single factor rate of the line-haul carriers to the unloading chutes of the Yards, is justified by differences in transportation circumstances and conditions. This question is discussed under the next heading.

III.

In finding that the assailed rates did not violate either sections 3(1), 2, or 1(9) of the Act, the Commission acted rationally and upon substantial evidence. In dealing with the question of alleged unlawful rate relations, that is, undue preference, prejudice and discrimination, the issue turns on the matter of similarity or dissimilarity of the services involved.

The contention of appellant that section 3(1), which prohibits undue preference and prejudice, is violated because dead freight moves to the Swift private siding on the flat Chicago basis, whereas livestock is required to pay the combination of the line-haul carriers rate plus the switching charge of Junction, cannot be sustained for two reasons. In the first place, the Commission found affirmatively that there was a difference in the measure of the transportation services required, dead freight as compared with livestock. In the second place, there is no competitive relation between dead freight and livestock and consequently it cannot be said that dead freight is unduly advantaged merely because livestock pays a combination rate basis instead of the flat Chicago basis provided for dead freight.

As to the claimed violation of section 2 (which prohibits the exaction of different rates for like services in the transportation of like kinds of traffic under substantially similar circumstances and conditions), there is an affirmative finding by the Commission, adequately supported by evidence, that deliveries made at Chicago on the flat Chicago rate basis, such as those of the line-haul carriers at the unloading chutes of the Yards company, are substantially dissimilar from the private track delivery sought by Swift.

As to the alleged violation of section 1(9) of the Act (which deals with the operation of connections with private

sidetracks and with the furnishing of car service without discrimination), it is sufficient to say that the Commission correctly viewed that section as inapplicable to the case before it. This is because Swift's complaint to the Commission was directed to the lawfulness of rates and rate relations and not to the matter of physical operations and car service, the latter being the subject of section 1(9).

IV.

Appellant writes his entire brief as if this case were controlled by *United States* v. *Baltimore and Ohio R. Co.*, 333 U.S. 169, in which this Court sustained the order of the Interstate Commerce Commission in *Swift & Co.* v. *Baltimore & O. R. Co.*, 266 ICC 55. That case is completely dissimilar to the instant case. In the first place it involved exclusively the question of service, whereas the instant case involves a question of rates and rates only. In the second place, the services required to be performed in the case cited constituted a restoration of a practice of many years standing. In the instant case the rate basis sought by Swift and the method of handling livestock which would be followed under that rate basis is completely opposed to the practice of many years standing.

V.

Appellant contends that the Commission's order is invalid because it failed to require the Junction to equip itself with sufficient additional properties and additional facilities to take care of the handling of packer "direct" livestock to private sidings. But that cannot be so since the Swift complaint before the Commission was silent on such issues and prayed for no order to be issued requiring the Junction to do anything at all about its facilities and properties devoted to common carrier service.

VI.

The alleged illegal covenant in the lease of the Junction properties to the Chicago River and Indiana Railroad has no pertinency to any issue decided by the Commission and no pertinency to any question involved in the instant review of the Commission's order of dismissal. The Commission treated that covenant as having no bearing on either side of the case. Even if the covenant is an illegal covenant, it has no pertinency to any of the rates involved in the Swift complaint. It has no pertinency to the switching rate of the Junction considered independently of the through rates since that rate was found by the Commission to be reasonable in the light of the services covered thereby. The covenant has no pertinency to the refusal of the line-haul carriers to absorb the Junction switching charge since the covenant is not that of the line-haul carriers but is that of the switching line. Under such circumstances the Commission's failure to give weight to the covenant did not constitute action which was arbitrary or beyond its power.

ARGUMENT.

I.

With few exceptions, the issues argued by the appellant are not within the scope of judicial review of Interstate Commerce Commission orders under the Administrative Procedure Act.

The classic formulation of the proper scope of judicial review with respect to orders of the Interstate Commerce Commission was spelled out in detail more than 40 years ago, by Mr. Chief Justice White in *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U.S. 452, 470 and by Mr. Justice Lamar in *Interstate Com. Com.* v. *Union P. R. Co.*, 222 U.S. 541, 547. Every word and every term which is used to define the scope of judicial review in the Administrative Procedure Act was anticipated, either in so many words or in substance, in the opinions just cited. In more recent cases the issues open to review have been specified somewhat more tersely, yet consistent with the requirements of the Administrative Procedure Act. In *Mississippi Valley Barge L. Co.* v. *United States*, 292 U.S. 282, 286-287, this Court said:

> . . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

In *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 140, this Court said:

> Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised.

The question of what rate is necessary to conform to the standard of reasonableness under section 1 of the Act; the question of whether through routes and joint rates are necessary or desirable in the public interest, the standard of lawfulness under section 15(3) of the Act; and the question of whether a particular rate relation is, or is not, a prohibited preference, prejudice or discrimination under sections 2 and 3(1), are solely questions of fact as to which the Commission, when acting within its authority, has the final say-so. *Manufacturers R. Co.* v. *United States*, 246 U.S. 457, 481; *Nashville, C. & St. L. R. Co.* v. *Tennessee*, 262 U.S. 318, 322; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 353; and *Virginian R. Co.* v. *United States*, 272 U.S. 658, 663.

Appellant rarely pays even lip service to the rule of the cases above cited. The preponderance of its argument is directed to this Court as if it were the administrator and as if it were the function of this Court to determine, *as a fact*, whether the rates assailed are in violation of the statute as alleged by appellant. In so arguing the case, appellant is consistent with the grounds recited in its complaint in the lower court for the alleged invalidity of the Commission's order. That complaint covers 44 numbered paragraphs and 50 printed pages in the record (R. 1-50); and in paragraphs 9(f), 11, 13, 15, 16, 18(c), 19, 20, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 37, 42 and 43 thereof, we find a direct charge *in so many words* that the error of the Commission consisted of "giving weight" to particular facts and findings. The other paragraphs in that complaint largely consist of allegations that the Commission erred because it failed to give weight to, and have its decision controlled by, this, that, or other isolated items of facts, which the Commission treated as not controlling to the extent claimed by the appellant upon its decision.

The only issues raised by appellant's complaint in the

lower court which are actually within the scope of judicial review, are first, whether the report of the Commission provides an adequate, that is, a rational, statement of reasons and basis for the order of dismissal; second, whether there is substantial evidence to support the reasons and basis for the dismissal recited in the report; third, whether the facts and circumstances relied upon by the Commission in dismissing the complaint were legally relevant, that is, entitled to consideration by the Commission as an administrator; and fourth, whether the Commission acted within its authority in refusing to rule in appellant's favor as to particular issues of unlawfulness raised by the appellant's complaint before the Commission and the proof adduced in support thereof. It takes a very careful search of appellant's brief to find a specification of an error which is within any one of the issues just listed, or to find any argument other than that which simply asks this Court to substitute its judgment for that of the Commission as to the questions of fact which are within the Commission's final say-so.

By way of illustration, we call attention to the following: Appellant argues that the addition of the switching charge in case of livestock delivered at Swift's private side track is unreasonable *per se*, and therefore illegal as a matter of law, just because other freight moves to private sidings on the Junction over through rates and at joint rates on the flat Chicago basis (I D, p. 60). All of appellant's point II, which deals with alleged discrimination growing out of the rates assailed, proceeds upon the theory that the alleged violations of the various sections of the Act cited are violations *as a matter of law*, and that, upon the facts, the Commission *was without power* to find otherwise (II pp. 63-89). In its point IV appellant not only goes out of the field of judicial review, but even leaves the case, because the argument there advanced is that the Commission erred in failing

to require improved operating conditions of the Junction (IV, pp. 105-116), a matter not remotely in issue. Likewise in point V, which involves what appellant alleges to be a discriminatory and an illegal covenant under which the New York Central agrees to operate the Junction for the "benefit, advantage, and behoof of the business and affairs" of the Yards Company, appellant completely departs from the issues before the Commission and the question of whether the Commission's report provides a rational explanation for its rulings on the issues. Rather, appellant contends, first, that the Commission should have found the covenant mentioned illegal, although no issue as to the covenant is raised by the complaint, and second, that upon such a finding the Commission, *as a matter of law*, should have found the assailed rates to be unreasonable and discriminatory. This is about as far removed as one can possibly get from the proper field of judicial review, because the Commission treated that covenant as without either significance or bearing on any issue decided by it. (R. 79-80)

There is nothing peculiar or unusual about the instant case which should lead this Court to test the validity of the Commission's order by other than the usual standards. Those standards are noted above and the only possible questions which can arise thereunder have been listed. Consequently, we confine the remainder of the brief of these appellees to alleged grounds of invalidity which fall within the range of issues open to review.

II.

The Commission committed no error of law, either of omission or commission, in construing and applying the various provisions of the Interstate Commerce Act which deal with the justness and reasonableness of rates.

Point I of appellant's argument (pages 48-62 of brief) challenges the action of the Commission in finding that the rates assailed are not unjust and unreasonable in violation of section 1 of the Act. Much of appellant's argument on this point is in the direction of asking this Court to substitute its judgment for that of the Commission as to the questions of fact involved. Since that portion of the argument deals with issues not within the scope of judicial review, it will not be noted. As to issues within the province of this Court to consider, we develop below under appropriate subheadings the fallacies in appellant's contentions and argument.

First, however, we develop under the two subsections which follow immediately, a rationale for the Commission's dismissal which appellant virtually ignores, i.e., the injury to the public interest which the evidence shows and the Commission found would result upon the grant of the Swift demand. That circumstance, standing alone, is sufficient to validate the Commission's ultimate conclusion that the rates assailed are not unjust and unreasonable in violation of section 1 of the Act.

The unchallenged finding of the Commission that through routes to the Swift private siding with joint rates thereover on the flat Chicago basis are not necessary or desirable in the public interest adequately supports the Commission's conclusions that the rates assailed are not unjust and unreasonable in violation of section 1 of the Act.

The Commission has no power by order directed against a line-haul carrier alone to require such line-haul carrier to

extend the rate published by it to Chicago (as a point on its own line) to a delivery not on its line—that being the effect of an order requiring the absorption of a switching charge—in the absence of a finding of unjust discrimination and undue prejudice, that is, in the absence of proven violations of section 2 or 3(1) of the Act. See *Automatic Gravel Prod. Co.* v. *Burlington M. & N. W. Ry. Co.*, 151 ICC 481, 486; *Switching Charges on Crushed Stone*, 186 ICC 322, 327; *Fitchburg Gas & Electric Light Co.* v. *B. & M. R.R.*, 147 ICC 145, 149; *Reciprocal Switching at Richmond, Va.*, 222 ICC 783, 800; *Standard Packing Co.* v. *South Omaha Term. Ry. Co.*, 229 ICC 479, 482; *Crossfield Ice Co.* v. *Southern Ry. Co.*, 232 ICC 795, 799; *Price Chemical Co.* v. *Louisville & N. R. Co.*, 215 ICC 365, 367. The soundness of the rule of the cases just cited is manifest. When a through rate from a C&NW origin, such as Omaha, Nebraska, to a location on a separate switching line, such as the private siding of Swift on the Junction, is made up of two separately stated charges, the switching line may not be charged with responsibility for an unreasonable through rate in the absence of proof that its rate is excessive for the separate services covered thereby—a claim not made by appellant in this case—; and the C&NW may not be charged with responsibility for an unreasonable through rate merely because a switching service beyond its rails is required to make delivery and the switching line insists on being paid therefor. Consequently, the C&NW in the situation mentioned—two separate charges being published and maintained—may not be compelled to provide the shipper with the flat Chicago rate by absorbing the separate charge of the switching line, except when necessary to correct an unlawful discriminatory, preferential, and prejudicial rate relation.

However, the Commission does have power under section 15(3) of the Act,[4] to require the line-haul carrier, as, for

[4] Set out in full in Appendix A hereto.

example, the C&NW from Omaha to Chicago, and the Junction to establish a through route from an interstate origin to the Swift private track and to apply thereover a maximum reasonable single-factor joint rate on the flat Chicago basis, provided that the one who seeks such a through route and joint rate bears the burden of proving that he is entitled to it under statutory standards. That is the relief sought by Swift under sections 1 and 15(3) by the amendment to its complaint. (R. 55-56)

The power conferred by section 15(3) is expressly conditioned on a finding by the Commission that the particular through route and maximum reasonable joint rate prescribed is "necessary or desirable in the public interest". In its report the Commission found flatly that the evidence would not warrant the necessary finding as to the rate sought by Swift. At page 573 of 274 ICC, the Commission said (R. 77):

> There is no warrant, . . . for a conclusion that the establishment of joint rates as desired by complainant is necessary or desirable in the public interest.

In its formal conclusions on page 576 of 274 ICC, the Commission said (R. 81):

> We find . . . (2) that the establishment of joint rates for the transportation of this traffic is not necessary or desirable in the public interest.

Appellant's complaint in the lower court does not allege that the Commission erred either in law or in fact in making the finding and conclusion just quoted. There is no claim in the pleadings or in the brief that such finding or such conclusion are contrary to or without substantial support in evidence of record. Appellant makes no claim that it offered any proof whatsoever on the question of public interest. Under such circumstances, it would seem that this Court must accept as incontestable the Commis-

sion's order in so far as it dismissed the sections 1 and 15(3) issues raised by appellant's complaint.

This, of course, does not settle the entire controversy since appellant alleges error on the part of the Commission in disposing of issues as to discrimination, preference and prejudice raised under other sections of the Act. The validity of the Commission's findings and order of dismissal with respect to such other issues are dealt with separately under appropriate headings herein.

Applicant apparently seeks to escape the force of the propositions developed above, which, if valid, would eliminate from this review all questions of evidence, fact and law as to the reasonableness of the charges under section 1, by treating the section 15(3) findings as without significance. On this point, appellant in a footnote on page 31 of brief says:

> The complaint as amended also contained a prayer (R. 56) for the establishment of joint-through rates between the line-haul carriers and the Chicago Junction. The merits of that prayer turn in part on the difference between the absorption of a switching rate by the line-haul carrier, which is the general practice throughout the country, and a division of the joint rate, which is the practice in Chicago (R. 293-294, 295, 843-845). Since, however, the basic issue in the present controversy, is, on the Commission's own statement (R. 59), the legality of the switching charge, and since in our view a joint rate which included the switching charge would be equally illegal, we have thought it conducive to clarity to omit all further reference to the establishment of joint rates.

Illegality of rates can take several forms. Rates can be illegal because excessive and unjust, thus in violation of section 1. Rates can be illegal because they occasion unjust discrimination or undue preference and prejudice in violation of section 3(1). When, as the Commission found, the appellant failed to prove that a through route with

a joint rate thereover on the flat Chicago basis is necessary or desirable in the public interest, appellant's case then becomes limited to the legality of the added switching charge under the anti-discrimination provisions of the Act.

The Commission rightfully dismissed the Swift complaint because what it sought was against the public interest.

Appellant concedes on page 59 of its brief:

> * * * If what Swift sought was against the public interest, it should not be permitted at any price.

In the preceding section of this argument we quote two very specific findings of the Commission that what Swift sought was not necessary or desirable in the public interest. (R. 77, 81) Those findings provide the rational basis for the Commission's conclusion that the rates assailed were not unreasonable. Those findings are not challenged by the appellant, either as to their sufficiency or as to their support in the evidence. The Commission's findings on the question of public interest, when read in the light of the discussion which leads up to them, are not mere negative findings; rather, they reflect a view that distinct harm to the public interest would result from the grant of the Swift demand.

In addition to the findings of the Commission which use the phrase "public interest", above quoted, the Commission dealt in two other findings with the harm to the public interest, which would result from the grant of the Swift demand.

R. 76-77:

> Interferences with the movement of livestock to the stock yards is a serious concern not only of defendants but also of producers and livestock marketing agencies who desire expeditious movement of livestock and continued functioning of the public market in a manner that is adequate for their needs.

And (R. 77):

> We may, . . . disapprove the inauguration of a continuing practice of delivering livestock directly to packers in circumstances where, as we have found would be the case here, such practice would seriously interfere with, delay, and disrupt terminal operating conditions and the movement of livestock generally.[5]

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[5] Preliminary findings of the Commission as to the effect on the railroad services of the line-haul defendants and the Junction if the Swift demand were granted, read as follows:

> Under the present practice, followed since the inauguration of services to the Union Stock Yards in the interest of expeditious centralized delivery, the yards of the Junction are not burdened with livestock cars either loaded or empty. It clearly appears that any attempt by the Junction to make deliveries of livestock generally to packers or to transport an amount of livestock substantially greater than complainant's present needs, would result in serious disruption of operations and services and serious delays in the delivery of livestock. * * * (R. 71)
>
> * * *
>
> . . . the conclusion is warranted that a substantial movement of livestock by the Junction would adversely affect efficient and expeditious terminal operations generally and that operations would be disrupted if much of the large movement of livestock to the stockyards area and thereturn movement of the empty cars, were performed by the Junction. (R. 71)
>
> * * *
>
> While, as above stated, any cars of livestock consigned to complainant could be handled in consolidated trains by grouping such cars at the head of the train with the cars of dead freight intended for set-out in the south yard, nevertheless because of difficulties peculiar to livestock traffic, such handling would, it appears, affect adversely the line-haul carriers' operations incarrying livestock to the stockyards. * * * (R. 72)
>
> * * *
>
> * * * Having in mind the congested condition of yards and tracks, it is clear that the attempt to make plant delivery through and over them of even 18 cars of livestock daily would considerably delay and burden defendants' operations. Moreover, although it is shown that complainant's direct shipments of livestock average 18 cars a day, such average necessarily includes days when the shipments exceeded 18 cars. Also it appears that the number of complainant's direct shipments of livestock in proportion to the number bought at the stock-

While the foregoing findings do not use the phrase "public interest", it may not be doubted that they relate thereto. The serious harm to livestock producers and shippers generally, which would inevitably result from the grant of the Swift demand (See Statement, pages 7 to 10 above), is an exceedingly important circumstance to be considered in evaluating the public interest. Here again, there is no claim from appellant that the findings immediately above quoted are not supported by substantial evidence. If they are challenged at all, it is only with respect to their legal relevancy to the Commission's conclusion.

In *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535-536, this Court said that the matter of public interest "is . . . the business of the Commission, made such by the very terms of the statute".

In the instant case the Commission concerned itself with "its business" and found that what Swift sought was **not** in the public interest. There being no question as to the substantiality of the support which the evidence provides for the findings on this point, the Commission's order, in so far as based thereon, becomes incontestable.

This should be sufficient to settle all questions presented by the case with respect to the reasonableness of rates under sections 1 and 15(3).

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yards has been steadily increasing, and the testimony of complainant's witnesses affords ground for the belief that that condition will continue. (R. 74, 75)

* * *

* * * Nevertheless, it is our best judgment, and we, therefore, so find and conclude, that, if complainant's demand for the delivery service at the line-haul rates were granted, there would result demands from other packers requiring defendants to render like delivery service in an amount and volume which together with such service rendered complainant would seriously interfere with, delay, and disrupt defendants' terminal operations in carrying livestock to the Union Stock Yard and in making deliveries of other freight to the industries on the Junction's lines. (R. 76)

Findings to show that the measure of an assailed rate or rate relation is justified by the cost of the services covered thereby are not required to support the validity of an order which dismisses a complaint upon a finding that the assailed rates are not shown to be unreasonable.

The appellant had the burden of proof in the proceeding before the Commission. In disposing of the issue raised by its complaint under sections 1 and 15(3), the Commission found, as noted above, no warrant for a conclusion that a joint rate on the flat Chicago basis to the Swift private siding is necessary or desirable in the public interest. In addition, the Commission found (R. 80):

> The evidence affords no basis for a conclusion that the terminal charge of the Junction in addition to the line-haul rates is unreasonable for deliveries of livestock to the proposed plant, considering services and modification of services that would be required for the desired deliveries and the effect upon terminal operations generally of performing such delivery service to the proposed plants.

Appellant says that the foregoing finding is not sufficient to support the order of dismissal; that, in the absence of findings as to rate versus cost relations, the conclusion of the Commission "stands simply as an arbitrary *ipse dixit*" (page 54); and that, for this reason, the Commission's order of dismissal must be set aside. This is the burden of appellant's entire argument under point I on pages 50-62 of its brief, although presented with variations.

This contention of appellant's is a strange one. A shipper complains that his rate is excessive in relation to the rate of his competitor and, according to appellant, he must prevail *as a matter of law* unless the railroad defendants bear the burden of a cost-of-service justification, and the Commission specifically finds that the difference in rates assailed

by the shipper is justified from a cost-of-service standpoint. Lacking such finding and such evidence—such evidence from the defendants being essential to the entry of a finding as to costs under appellant's theory—the appellant says that the Commission has no power to dismiss the complaint. Before looking at a single authority relied upon, common sense tells us that no such rule of law has ever been enunciated by this or any other court. There is no possible theory under which the burden of proof can be shifted, as appellant would shift it, from the shoulders of Swift to the shoulders of the railroads which were the defendants before the Commission.

When we come to consider the authorities cited and relied upon, we find that appellant has confused the instant case, in which the Commission neither prescribed nor approved any rate, but only found appellant's allegations as to unlawfulness not sustained by its proof, with cases in which the Commission has prescribed or approved rate differences or increases in charges without evidence or findings to justify or support its action.

Interstate Commerce Com. v. *Mechling,* 330 U.S. 567, is typical of appellant's authorities. In that case railroads operating east from Chicago performed identical services in the on-transportation of grain whether it arrived at Chicago via rail or via barge, but the Commission fixed and approved a rate difference (3 cents per 100 pounds) to the disadvantage of the ex-barge grain. This Court simply held that the prescribed rate difference for services apparently identical could not be sustained in the absence of a proven difference in cost. The prescription of different rates for identical services, as in the *Mechling* case, has nothing in common with the instant case in which the Commission found that the through rate assessed for the *two-line services* of the line-haul carrier and the Junction to the Swift private siding had not been shown to be

excessive and unreasonable in violation of section 1, even though it was higher than the through rate assessed for the *one-line service* of the line-haul carrier to the unloading chutes of the Yards Company. Obviously, the *Mechling* case and the instant case have nothing in common.

Likewise as to *New York Central R. Co.* v. *United States,* 99 F. Supp. 394 (D. Mass.) affirmed, 342 U.S. 890; *Palmer* v. *United States,* 75 F. Supp. 63 (D.D.C.); and *Tennessee Valley Authority* v. *United States,* 96 F. Supp. 409 (N.D. Ala.). In the *New York Central* case the order of the Commission had the effect of requiring railroads to continue in effect a higher rate on grain to Boston and New York than to Baltimore and Philadelphia, although they proposed a reduction in rates to Boston and New York so as to provide port equalization. The District Court set that order aside because neither the evidence nor findings in the report provided support for an order compelling the continuation in the future of the rate difference which the railroads proposed to eliminate. In the *Palmer* case the order of the Commission required an increase in the rental charge on freight cars. The order was set aside because the Commission failed to provide findings to justify its requirement that the rental charge be increased. In the *Tennessee Valley Authority* case the Commission approved a railroad proposal to apply a higher switching charge on ex-barge grain than on ex-rail grain without evidence to support the rate difference given its affirmative approval. The District Court treated that case as controlled by the *Mechling* case, as indeed it was. But for reasons stated above, such a case has nothing in common with the instant case.

Except in cases like *Mechling* and *Palmer,* neither this nor any other Court has held that evidence and findings with respect to rate versus cost relations are essential to the validity of a Commission order. In cases involving

different services in which the Commission has actually prescribed the rates to be charged, as well as the arbitraries or differentials by which they should differ, this Court has held squarely that such evidence and findings are not necessary supports for a challenged order. In *Louisiana Pub. Serv. Com.* v. *Texas & N.O.R. Co.*, 284 U.S. 125, this Court had under review an order of the Commission prescribing mileage scale rates on sand and gravel which included an arbitrary when the service involved a crossing of the Mississippi River. The order was assailed on the ground that the arbitrary was not supported by evidence or by findings with respect to the cost thereof or the difference in cost. This Court sustained the order against that attack. To the same effect, is *Alabama Great S. R. Co.* v. *United States*, 340 U.S. 216, 223, 225. Compare *New York* v. *United States*, 331 U.S. 284, 331, and *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 592.

The switching charge of the Junction on livestock is not a penalty charge, prohibitive or otherwise.

Appellant repeatedly characterizes the switching charge of the Junction on livestock as a penalty charge and as if its only purpose were to make prohibitive (from the standpoint of costs) the handling of livestock by the Junction in switching service. There is no warrant in the facts of the case for either contention.

The switching charge of the Junction represents the compensation which it believes it should have whenever required to undertake the difficult task of handling livestock in switching service from its Ashland Avenue south yard to a private industry track on its rails. Appellant does not challenge the right of the Junction to be compensated for that service. Appellant does not challenge the measure of the charge, considered independently of the through rate.

We find in its brief no mention of any evidence offered by it tending to prove that the $28.80 switching charge per car, in effect at the time of the hearing, was excessive for the livestock switching services covered thereby. A penalty rate or charge connotes the addition of something over and above what would otherwise be just, reasonable and compensatory. But applicant cannot show that the Junction arrived at the $28.80 per car charge by adding some amount to what would otherwise be a normally reasonable and compensatory charge. It is a misnomer to call the switching charge of the Junction a penalty charge.

Nor is appellant on sounder ground when it characterizes the switching charge of the Junction as if designed to prohibit the movement of livestock over its rails. Its only basis for that characterization is that the Junction's switching charge exceeds appellant's trucking cost from the Omaha Packing Plant tracks to the Yards, and also exceeds the stock yards charges assessed by the Yards Company on shipments of "direct" livestock delivered through and by use of the facilities of the Yards Company. But that does not mean that the switching charge was fixed higher than the charges or costs of other methods of delivery so as to induce appellant to use one instead of the others.

If the higher charge or cost for one method of delivery than another is, in truth, a penalty charge, then, by the same token, the charges assessed by the Yards Company are penalty charges because higher than the cost to appellant of truck delivery for its direct livestock. The statement of the proposition indicates its absurdity.

The switching charge is simply a charge thought necessary by the carrier to cover the services involved. There isn't a scintilla of proof that it was made in consideration of or with regard to either the trucking cost of the appellant or the stock yard charges of the Yards Company. The

switching charge stands here on its own bottom, related only to the service which it covers. It is a reasonable charge according to the findings of the Commission and those findings are supported by substantial evidence. It should not be looked upon by this Court in any other light, regardless of the extravagance of appellant's language.

III.

The Commission committed no error of law, either of omission or commission, in construing and applying the various anti-discrimination provisions of the Interstate Commerce Act.

Under point II of brief (pp. 63-89), appellant contends that the rates assailed are in violation of sections 3(1), 2, and 1(9) of the Act. The dimissal of the complaint with respect to issues raised under various anti-discrimination provisions of the Act was based on adequate findings and substantial evidence which we discuss below.

The dismissal of the section 3(1) allegations of the complaint is supported by adequate findings and such findings are supported by substantial evidence.

Appellant argues that livestock is unduly prejudiced and dead freight is unduly preferred because the dead freight consigned to Swift's private siding is transported thereto via through routes over which apply joint rates on the flat Chicago basis, whereas livestock must pay the combination basis hereinabove described. (Brief, pp. 63-69)

The refusal of the Commission to require a like scheme of rates for livestock and dead freight by an alternative order issued under section 3(1) of the Act is clearly within its authority. For one reason, the Commission's report

contains an affirmative finding as to differences in services. On that point, the Commission said (R. 65):

> The measure of the transportation services rendered shipments of livestock is substantially greater than that accorded dead freight. * * *

The differences in the services required is spelled out in detail by the Commission on the several pages of its report which follow immediately after the sentence above quoted. (R. 65-74) Appellant does not dispute the truth of the facts stated by the Commission with respect to the services required when livestock is switched as compared with the services required when dead freight is switched. Rather, appellant marshals the facts to suit its own ideas on the matter and argues, in effect, that the Commission came to an erroneous conclusion. Here again appellant addresses itself to issues not within the scope of judicial review because this Court has repeatedly held that all questions as to the weight of the evidence are exclusively for the Commission to decide. See *Virginian R. Co.* v. *United States*, 272 U.S. 658, 663; *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 508; *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U.S. 88; *Board of Trade* v. *United States*, 314 U.S. 534, 548; *United States* v. *Berwind-White Coal Min. Co.*, 274 U.S. 564, 580-581; *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 359; *New York* v. *United States*, 331 U.S. 284, 331, 349; and *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593.

The second ground on which the Commission's order of dismissal as to the issue under section 3(1) may be supported involves the universally accepted rule that section 3(1) does not apply to other than competitive situations. See *Barrett Co.* v. *Atchison T. & S. F. Ry. Co.*, 172 ICC 319, 333-334. Livestock is not competitive with dead freight. Consequently, it is not disadvantaged by reason of the fact that dead freight is transported to private

sidings on the Junction without the addition of switching charges. Conversely, dead freight gains no benefit or advantage whatsoever from the fact that the switching charge is added in the case of livestock. If an alternative order were issued under section 3(1) and the railroads, in compliance therewith, cancelled the joint rates on the flat Chicago basis on the dead freight, thus making applicable the combination line-haul rates plus the switching charge of the Junction, the appellant's position as to livestock delivery cost would not be imroved. That means livestock is not *unduly* prejudiced and dead freight is not *unduly* preferred. It necessarily follows that to treat livestock differently than dead freight in respect to the construction and application of through rates does not violate section 3(1), even if such difference in treatment were not justified by difference in transportation conditions.

It is significant that in *Swift & Company* v. *Baltimore & O. R. Co.*, 266 ICC 55, in which the Commission required railroads at Cleveland, Ohio, to provide service for the delivery of livestock on a private siding[6] of Swift & Co., the finding under section 3(1) did not relate to the delivery of dead freight on that siding. Rather, the Commission made its finding and granted Swift relief under section 3(1) because other packers adjacent to the Stock Yards at Cleveland were provided with service in the delivery of livestock under circumstances and conditions which the Commission found were similar to those encountered on the tracks serving Swift over which service as to livestock was refused.

[6] The order of the Commission in that case was sustained by this Court in *United States* v. *Baltimore and Ohio R. Co.*, 333 U.S. 169.

The refusal of the Commission to find a violation of section 2 of the Act is adequately supported by findings and said findings have the support of substantial evidence.

On pages 69 to 79 of brief, appellant argues that the prohibition in section 2 against unjust discrimination is violated when livestock destined to Swift's private siding is subjected to a combination through rate and livestock destined to the unloading chutes of the Yards Company in the same general area is subjected to the lower, flat Chicago rate.

Section 2 forbids the exaction of different rates for "like and contemporaneous service[s] in the transportation of . . . like kind[s] of traffic under substantially similar circumstances and conditions . . .".

The Commission made a finding of fact which is directly opposed to appellant's claim under section 2, saying at page 574 of 274 ICC (R. 78, italics supplied):

> * * * The transportation services, conditions, and circumstances connected with deliveries by the line-haul carriers at the unloading chutes of the Union Stock Yards, as hereinbefore described, also are *substantially dissimilar from the private track delivery sought.*

Appellant ignores the finding just quoted. Yet that finding stands in the way of every contention advanced by it under section 2 unless the finding is not supported by substantial evidence. As to that, it should be sufficient for the purposes of this review simply to note that a direct one-line service by the line-haul carrier is involved in delivering at the unloading chutes of the Yards Company, whereas a two-line service of the line-haul carrier and the Junction is involved in delivering to the Swift private siding. That circumstance, even if it stood alone, is sufficient to make section 2 inapplicable.

However, before we conclude our consideration of the

facts, it is desirable to make clear the services rendered by line-haul carriers in handling the livestock which is transported from outer yards to the unloading chutes of the Yards Company, whether in exclusive or in consolidated trains (See Statement, pp. 5 to 6 above). We deal with the point because at many places in its brief appellant says, in effect, that the livestock handled in the consolidated trains—such trains constituting 37 percent of the total trains transporting livestock to the unloading chutes—requires additional set outs, additional switching, etc., beyond the simpler operation involved in delivering to unloading chutes of the Yards Company the livestock contained in the exclusive livestock trains (Appellant's brief, p. 71).

The fact is that the livestock contained in the consolidated trains is neither "switched" nor "set out" during the course of its journey from the line-haul carrier's outer yards to the unloading chutes of the Yards Company. The consolidated train is stopped on the running track near the east end of the Ashland Avenue south yard so that the dead freight, which is at the head end of the train, may be cut loose from the livestock and switched into receiving tracks in the Ashland Avenue south yard of the Junction. Then, the engine picks up the livestock cars at the place where they were left to proceed thence to the unloading chutes, a short distance to the east. But there is no set out of the livestock. It moves over precisely the same route in every particular as that over which move the exclusive livestock trains. The stopping of the livestock in the consolidated train on the running track has no greater significance than the stopping of the exclusive livestock train on the same running track while waiting opportunity to proceed to the unloading chutes.

In the course of its argument on its section 2 point, appellant cites *Seaboard Airline Railway Co.* v. *United States*,

254 U.S. 57, in which this Court sustained the order of the Commission in *Richmond Chamber of Commerce* v. *S. A. L. Ry.*, 44 ICC 455, as if it held that section 2 requires the *charging* of an identical rate to all deliveries in the same terminal district. That case had nothing to do with the *measure* of the charges for switching services when in addition to line-haul rates. That case arose because line-haul railroads reaching Richmond, Virginia, followed a practice with respect to absorption of switching charges under which such charges would be absorbed *if* the switching line also served the origin point, but would not be absorbed as to *like* traffic from the *same* origin point if switched by another line not serving said origin point. The Commission held that this difference in treatment was a violation of section 2 because the difference in absorptions was not based on a difference in transportation conditions, but was based on the matter of a difference in carrier competition. No similar situation is involved in the instant case. Furthermore, it is significant that in the *Richmond* case, the Commission acknowledged by its discussion the propriety of different switching charges in the same terminal area; and its command as to quality of treatment did not disturb that situation.

Appellant cites no case involving a higher *charge* assessed for the combined services of two lines to a place of delivery different from the place of delivery to which a lower charge applied for a single line service in which a violation of section 2 has been found. No such case is cited because there is none.

In *Barringer & Co.* v. *United States*, 319 U.S. 1, was involved an order of the Commission which authorized the addition of a loading charge to the line-haul rate on cotton when destined to the southeast and at the same time authorized the elimination of such loading charge *for an identical loading service at the same point* when the cotton

was destined to the Texas Gulf ports. The Supreme Court sustained the order because of a difference which the Commission found as to circumstances surrounding the services to the two different delivery points for the cotton. The Court at page 6 said:

> * * * But differences in rates as between shippers are prohibited only where the "circumstances and conditions" attending the transportation service are "substantially similar." Whether those circumstances and conditions are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of the particular shipper rather than to circumstances attending the transportation service, is a question of fact for the Commission's determination. Hence its conclusion that in view of all the relevant facts and circumstances a rate or practice either is or is not unjustly discriminatory within the meaning of section 2 of the Act will not be disturbed here unless we can say that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute.

Appellant's complaint before the Commission involved no situation to which section 1(9) of the Act applies.

On pages 80-83 of brief, appellant argues that the switching charge of the Junction violates section 1(9) of the Act. The ground for that contention is that a joint through rate applies on dead freight, as compared with the combination of line-haul rate and switching charge on livestock, so that the livestock is discriminated against in the "operation of the switch track."

Section 1(9) requires every common carrier subject to the act to "construct, maintain, and operate upon reasonable terms a switch connection with any . . . private sidetrack which may be constructed to connect with its railroad" and such a common carrier is required to "furnish

cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

Plainly, section 1(9) deals only with facilities and with service. It does not deal with switching rates, whether alone or in combination with line-haul rates, nor does it deal with rate relations. The instant proceeding involves no question of discriminatory service. Nor does it involve a refusal to furnish cars, the service which the section specifies shall be rendered "without discrimination".

A check of the decisions in which the Commission has found it necessary to apply section 1(9) indicates that in every instance they involved a limitation on the service which a carrier was willing to provide to or from private sidetracks, rather than the measure or relation of the rates to be applied upon the furnishing of the services. This is sufficiently illustrated by the cases which appellant cites on pages 80 to 83 of its brief.

IV.

The instant case is neither like nor controlled by United States v. Baltimore & O. R. Co., 333 U.S. 169.

In *United States* v. *Baltimore and Ohio R. Co.*, 333 U.S. 169, hereinafter referred to as the *Cleveland* case, this Court sustained an order entered by the Commission in *Swift & Company* v. *Baltimore & O. R. Co.*, 266 ICC 55. That decision of this Court is cited on 20 different occasions in appellant's brief. It is characterized as the "controlling precedent" (pp. 41, 86). The appellant claims that "the facts in the two cases are the same in every relevant particular" (p. 41), and that "it would be difficult . . . to find two cases which are closer on their facts . . .". (p. 88)

We propose to show that neither the facts nor the issues

in the *Cleveland* case are like those in the instant case, and that the questions on which that case turned in this Court are not even remotely like the questions presented on the review of the Commission's order in the instant case.

The facts in the *Cleveland* case as shown in the report of the Commission in 266 ICC 55 are as follows: The Swift Packing plant at Cleveland was served by the New York Central Railroad. In serving the plant, the New York Central operated over Track 1619, which was owned by the Cleveland Union Stock Yards Company, hereinafter called the *Stock Yards*. For many years the New York Central had operated over the track in question in delivering both livestock and dead freight on the basis of the flat Cleveland rates. That was the practice whether the New York Central was the line-haul carrier as to the traffic in question, or whether other railroads brought the traffic to Cleveland and the New York Central acted simply as a switching carrier.

In 1935, upon notice as provided under the existing trackage agreement, the trackage agreement was amended to prohibit the use of Track 1619 by the New York Central in hauling livestock to Swift, unless a separate charge or rental was paid to the Stock Yards Company. The railroads were unable to agree with the Stock Yards as to the price on which they would be allowed to continue the use of Track 1619 in delivering livestock to Swift. Consequently, the railroads declined to continue such deliveries. However, deliveries at the flat Cleveland rate were continued for numerous competitors of Swift at Cleveland who could be and were served without the use of Track 1619.

In the case before the Commission there was no issue as to rates. The only issue related to services. The flat Cleveland rate basis applied on livestock delivered to the Swift track during many years in which livestock was transported thereto, and it was only the insistence of the Stock Yards

that it be paid a special charge whenever the track was used for livestock that led the New York Central to make its switching charge inapplicable to livestock.[7]

The railroads agreed that there was no physical difficulty in continuing the delivery which had been performed for many years. They rested their defense entirely on the prohibitory charge or rental which they would have to pay the Stock Yards if the track were used for livestock. The Commission held that the New York Central used the track in question as a common carrier and that it could not justify its refusal to serve thereover merely because of its trackage agreement with the Stock Yards.

In deciding that case in favor of Swift, all violations of law found related wholly to the refusal of the New York Central to serve; none involved the measure or relation of rates. For the convenience of the Court, we quote the finding as to each violation of the Act found by the Commission. As to section 3(1) (266 ICC 68):

> * * * The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects com-

[7] The reciprocal switching charge of the New York Central was $3.47 per car and the charge demanded of it by the Stock Yards exceeded that amount.

plainant to undue prejudice and unduly prefers the competing plants above named.[8]

As to the violation of section 1(6), which prohibits unreasonable and unlawful practices, the Commission found (266 ICC 69):

> * * * Accordingly, based on the above facts, circumstances, and considerations, we find and conclude that the defendants' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1(6) of the Act.

As to the violation of section 1(9), the Commission found (266 ICC 71-72):

> We find that the complainant has made application in writing to the carrier for the operation of the switch connection discussed and has tendered interstate traffic to such carrier; that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant; that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the connection is practicable and may be made with safety, and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready and willing to have transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central. We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section. Consequently, we

[8] These competing plants were also adjacent to the stock yard facilities at Cleveland.

find that a violation of section 1(9) of part I of the Interstate Commerce Act follows.

The railroads and the Stock Yards brought separate actions to enjoin the order of the Commission. The lower court enjoined the order on the ground that the Stock Yards had a property right in Track 1619 which entitled it to restrict the character of use to which it might be put by the New York Central under the trackage agreement. This Court reversed and stated the question to be (333 U.S. 175):

> * * * Can the non-carrier owner of a segment of railroad track who contracts for an interstate railroad's use of the segment as part of its line reserve a right to regulate the type of commodities that the railroad may transport over the segment, or would such a reservation be invalid under the Interstate Commerce Act?

In sustaining the order of the Commission, this Court held that the Commission had power to require a correction by the railroad of the discriminatory practices found to have been followed in respect to services rendered, and *held* that that power was not affected by the private ownership of the track in question. The narrow ground of the holding of this Court is indicated by the concluding paragraph from its opinion:

> We hold that the Commission's order was authorized by statute and that it does not deprive Stock Yards of its property without due process of law. In doing so we do not pass upon any questions in relation to the dedication of Track 1619 to railroad use. Neither do we decide what are the relative financial rights of Stock Yards and New York Central under their contracts, nor whether Stock Yards can cancel the contract with New York Central, nor what would be the duty of New York Central should Stock Yards attempt to terminate its right to use Track 1619. We only hold that Stock Yards' ownership of Track 1619 does not vest it with power to compel the railroads to operate in a way which violates the Interstate Commerce Act.

Plainly, the *Cleveland* case has nothing in common, either as to its facts, or as to the issues decided by the Commission, or as to the questions decided by this Court, with the instant case. Even taking the broadest view of the case and the matters involved therein, the two cases are fundamentally different. In the first place, what Swift sought and obtained in the *Cleveland* case was the restoration of an operating practice as to the use of trackage which had been followed for many, many years. In contrast, what Swift seeks in the instant case is a rate basis for livestock destined to private sidings on the Junction which is contrary to the accepted practice of many decades. In the second place, the defendants in the *Cleveland* case had declined to perform a service which it was both practical and possible for them to perform with ease and safety, and there was no suggestion that transportation services in the handling of livestock for the general public would be impeded or disadvantaged by the restoration of the service which Swift sought. In contrast, the grant of the rate basis which Swift seeks in the instant case would adversely affect transportation services rendered for the general public so that what Swift seeks is manifestly against the public interest, and the Commission so found upon substantial evidence.

V.

The Swift complaint did not pray for relief with respect to the adequacy of facilities and service on the Junction and the fact the Commission issued no order to require additional facilities or services does not invalidate its order of dismissal of Swift's rate complaint.

Under point IV in its brief (pp. 105-116) appellant argues that the Commission's order of dismissal of Swift's rate complaint should be set aside because the Commission failed to require such added facilities and service by the

Junction as might be necessary to handle livestock in switching service to private sidings.

Whether the facts are such as to warrant an order under section 1(11) of the Act, is not a question for decision in this case since the Commission proceeding involved no issue under that section. If there is a question as to the adequacy of the Junction properties and facilities, that question must be presented to and decided by the Commission before this Court can say whether or not the Commission acted within its authority in the premises.

VI.

The covenant in the lease given by the Yards Company to the Chicago River and Indiana Railroad Company, lessee and operator of the Junction, has no pertinency to any issue or question in the instant case.

Appellant devotes point V in its brief (pp. 117-141) to a covenant whereby the Chicago River and Indiana Railroad Company, a wholly owned subsidiary of the New York Central, agrees to operate the Junction in such manner "as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards". Appellant says that the covenant mentioned is "the heart of the case", that it is illegal, and that solely by reason of the covenant the Junction has failed to equip itself with the property and facilities necessary to the handling of livestock in switching service to private sidings. To prove this point, applicant relies wholly on a letter written by counsel for the Yards Company to counsel for the New York Central with reference to the production of evidence by the New York Central in defense of the Swift complaint before the Commission (Exhibit 57, R. 1961-1962). In that letter counsel for Yards expressed the opinion that the covenant required

the River Road and the New York Central to defend against the Swift complaint and that any failure to do so would be a breach of the covenant. Appellant argues that because the Commission dismissed the Swift complaint, it is, in effect, enforcing the covenant which is discriminatory and therefore illegal *per se*.

The Commission did not consider the matter of this covenant to have any pertinency to the issues before it or to be responsible for the rate basis assailed by the Swift complaint. The Commission's discussion and findings on this point read, (274 ICC 555, 575):

> Complainant asserts that a contractual relation exists between the Union Stock Yards and the Chicago Junction under a lease dated December 1, 1913, whereby the carrier agreed "to conduct, manage and operate the line of railroad by this instrument demised, and in so far as possible the same to conduct in such manner as will tend to the benefit, advantage, and behoof of the business and affairs of the Yards." The covenant quoted was incorporated in a later lease executed May 19, 1922, when the Chicago Junction subleased its line to the Chicago River & Indiana, a wholly owned subsidiary of the New York Central Railroad, for 99 years with an option to renew in perpetuity. *Union Stock Yard & Transit Co.* v. *United States*, 308 U.S. 213, 216. The effect of the leases was to completely divest the Union Stock Yards of operation and control of the terminal railroad, the Court saying that by ceasing to operate or control its railroad directly or indirectly, the Union Stock Yards restricted its transportation service to the loading or unloading of livestock as specified in its tariff. The operation of the Chicago Junction is subject not only to the provisions of the Interstate Commerce Act but also to the conditions imposed by the Commission in the *Chicago Junction Case*, *supra*. Those conditions were particularly intended to insure that the Chicago Junction and the Chicago River & Indiana should be operated as neutral terminal carriers, without special advantage favoring the New York Central but the conditions were and are broad enough

to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock Yards.

Since the Commission treated the covenant in question as having no bearing on the matters before it, either in the direction of warranting an order in favor of Swift or as warranting an order against it, there is no possible basis for the claim that the existence of the covenant operates so as to invalidate the Commission's order. Yet, that is what appellant's argument seems to come down to, i.e., that the mere existence of the covenant in question precludes the Commission from a dismissal of the Swift complaint.

Appellant apparently makes much of the matter of the covenant in the hope that it will make this case look like the *Cleveland* case. Obviously, the covenants in the two cases have nothing in common. In the *Cleveland* case the railroad entered into a contract which obligated it not to transport livestock over the track leading to the Swift plant unless it paid the Stock Yards Company a special charge which was higher than the switching charge named in the railroad's tariff. In the instant case there is no covenant as to either the rendition or the withholding of service, nor is there any covenant as to a particular rate basis. There is no evidence in this record which even suggests that the measure of the switching charge on livestock maintained by the Junction is due to any circumstance other than the operating conditions encountered when the services for which the charge is assessed are performed. That circumstance, and the others, noted under point IV above (pp. 40 to 45), show how dissimilar is the *Cleveland* case.

There is still another reason why everything that appellant argues about the covenant is completely beside the

point. The Swift complaint does not attack the reasonableness of the switching charge considered independently of the through movement. The Swift complaint is actually directed to the failure of the line-haul carriers to absorb the switching charge, or to the failure of the line-haul carriers and the Junction to join in a single-factor through rate on the flat Chicago basis. In either situation it is primarily the line-haul carriers who are responsible for the measure of the rates and the rate relations about which Swift complains. Taking this view of the case, which is the only proper view, it is obvious that the covenant between the Yards Company and the River Road had no bearing whatsoever on any issue decided by the Commission and has no pertinency to any question involved in this review as to the validity of the Commission's order.

CONCLUSION.

The Commission committed no error in dismissing the Swift complaint. Accordingly, the judgment of the District Court upholding that order should be affirmed.

Respectfully submitted,

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APPENDIX A.

Pertinent statutory provisions.

The statutory provisions referred to herein are set out in Appendix A to the brief of the appellant, with the exception of section 15(3) (49 U.S.C. 15(3)) of the Interstate Commerce Act which is set out below:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.